SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 13

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY AND SOLOMON LEVITAN, STATE TREASURER OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

ORLAND S. LOOMIS,
Attorney General of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin;
JOSEPH E. MESSERSCHMIDT,
Assistant Attorney General of Wisconsin.

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No. 888

EARLE S. WELCH,

Appellant,

vs.

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEES' STATEMENT OPPOSING APPELLATE JURISDICTION.

Pursuant to para. 3 of Rule 12 of the Rules of the United States Supreme Court, appellees file this statement.

Nature of the Case.

This action was brought to recover an income tax paid to the State of Wisconsin, assessed under the provisions of Sec. 6 of Ch. 15, Laws of Wisconsin, 1935. The controversy is in respect to the validity of such taxing statute.

Article VIII, Sec. 1 of the Wisconsin Constitution, so far as material, provides:

"* * * Taxes may also be imposed on incomes, * * *"

The Wisconsin Income Tax Law is contained in Ch. 71, Secs. 71.01 to 71.26, Wisconsin Statutes, 1933. Under the provisions of Sec. 71.04 (4) Statutes of Wisconsin, dividends received from a Wisconsin corporation are deductible from the income upon which the State normal income tax is computed.

Sec. 6 of Ch. 15, Laws of Wisconsin, 1935, entitled "Emergency Relief Tax on Certain 1933 Dividends" was enacted March 27, 1935. The material portions thereof are as follows:

"(1) For the purpose of this section.

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one per cent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three per cent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven per cent. * * *"

The facts in the instant case are not in dispute. It appears from the complaint that during the year 1933 the plaintiff Earle S. Welch was a resident of the State of Wisconsin and received a total income during that year of $13,383.26, of which $12,133.60 was in dividends from Wisconsin corporations; that under the Wisconsin income tax law then in effect, Ch. 71, Stats. 1933, the plaintiff was entitled to deduct from his gross income the full amount of such dividends; that in addition the plaintiff was entitled to deductions from his gross income for 1933 amounting to $11,161.97, plus donations of $100.00, making a total of said deductions of $11,161.97; that plaintiff made a true and correct return of his income during the year 1933, setting out the matters and things above, to the State of Wisconsin; that as a result thereof the plaintiff had no net income for the year 1933 subject to Wisconsin normal income tax; that Sec. 6 of Ch. 15, Laws of Wisconsin, 1935, enacted March 27, 1935, by its terms imposed an emergency relief income tax upon the net dividend income of all persons in 1933 which was deductible under Sec. 71.04 (4) Stats. of Wisconsin as received from Wisconsin corporations; that shortly prior to May 15, 1935, the plaintiff received from the Wisconsin Tax Commission a bill for such emergency relief income tax assessed under the provisions of Sec. 6, Ch. 15, Laws of Wisconsin, 1935, which the plaintiff thereupon paid in the amount of $545.71, under protest.

On July 23, 1935, the plaintiff commenced this action against the State Treasurer of the State of Wisconsin to recover such tax so paid under protest, contending that Sec. 6 of Ch. 15 of the Laws of Wisconsin of 1935 is contrary to the provisions of Sec. 1, Art. VIII and Sec. 13, Art. I

of the Wisconsin Constitution and Sec. 1 of the 14th Amendment to the Constitution of the United States. A general demurrer to the complaint was overruled. The Supreme Court of Wisconsin by a decision on January 12, 1937, reported in 223 Wis. 319, 271 N. W. 68, reversed the order overruling the demurrer and remanded the cause with directions to sustain the demurrer. The trial court thereupon sustained the demurrer with leave to the plaintiff to amend the complaint. Within the prescribed time the plaintiff duly amended the complaint and a general demurrer was interposed thereto, which demurrer was sustained. The plaintiff elected to file no further complaint and thereupon the trial court dismissed the complaint. Upon appeal therefrom the Supreme Court of Wisconsin, by a decision January 15, 1938, based upon its former decision, affirmed the judgment dismissing the action. Appeal is now taken to this Court therefrom.

No Substantial Federal Question is Presented.

The appellant claims as a basis for appellate jurisdiction, that Sec. 6 of Ch. 15 of the Laws of Wisconsin of 1935 in imposing an emergency relief income tax upon the dividends received by him from Wisconsin corporations in 1933 is violative of Sec. 1 of the 14th Amendment to the Constitution.

It is appellees' position that on the record herein no substantial Federal question is presented.

I.

The Matter Presented is One of Purely Local Concern.

The Wisconsin Constitution authorizes the imposition of a tax on income. Pursuant to said constitutional authority, the Wisconsin Legislature has enacted a law imposing a tax on income. By the terms of said law "income" includes

dividends received in 1933 from Wisconsin corporations, which dividends are not included in the net income of 1933 which was subject to the State normal income tax. The Wisconsin Supreme Court has sustained this law as a valid tax measure and determined that it is not contrary to the provisions of the Wisconsin Constitution.

In the very nature of the case, the matter is one of purely local concern, and the decision of the State Supreme Court thereon should be regarded as conclusive.

The review of a matter of purely local concern is not within the cognizance of the United States Supreme Court.

Manhattan L. Ins. Co. v. *Cohen*, 234 U. S. 123, 136.

The decision of the State court of last resort on a question of local law is not reviewable in the United States Supreme Court.

Ross v. *Oregon*, 227 U. S. 150, 164.

This Court will always respect the decision of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.

Rowan v. *Runnels*, 5 How. 134, 139.

It is well settled that decisions of the State courts based on local laws not involving constitutional questions are not reviewable in the Supreme Court of the United States.

American Ry. Express Co. v. *Commonwealth of Ky.* (1927), 273 U. S. 269, 47 Sup. Ct. 353, 71 L. Ed. 639.

The construction of a State statute by the highest court of the State must be accepted by the Supreme Court of the United States in testing the validity of the statute under the Constitution of the United States.

Quong Ham Wah Co. v. *Ind. Accid. Comisn. of Calif.* (1921), 255 U. S. 445, 41 Sup. Ct. 373, 65 L. Ed. 723;

Tampa Waterworks Co. v. *Tampa* (1905), 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170.

Thus the United States Supreme Court will follow the construction placed upon a State statute by the highest court of the State in order to determine whether a Federal right is involved.

McElvaine v. *Brush* (1891), 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971;

Mackay Tel. & Cable Co. v. *Little Rock* (1919), 250 U. S. 94, 39 Sup. Ct. 428, 63 L. Ed. 863.

Within the general rule that where although a Federal question is raised in the case, if there is also an independent question, not Federal in character, decided by the State court which in itself is broad enough to sustain the judgment the decision is not reviewable by the United States Supreme Court, a State judgment has adequate non-Federal support where it is grounded on the construction, application, or effect of the State statutory law irrespective of the Federal aspects of the case.

Mo. K. & T. R. Co. v. *West*, 232 U. S. 682, 34 Sup. Ct. 471, 58 L. Ed. 795;

Yazoo M. V. R. Co. v. *Brewer*, 231 U. S. 245, 34 Sup. Ct. 90, 58 L. Ed. 204.

The States are left a wide range of legislative discretion notwithstanding the 14th Amendment to the United States Constitution and the conclusions of the State courts respecting the wisdom of their legislative acts are not reviewable by the United States Supreme Court.

Arizona Employers' Liability Cases (1919), 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058.

Though the validity of a law is formally drawn in question in a suit in the State courts the Supreme Court of

the United States should decline jurisdiction and dismiss the appeal whenever it appears that the constitutional question presented is not substantial in character.

Zucht v. *King* (1932), 260 U. S. 174, 43 Sup. Ct. 24, 67 L. Ed. 194.

II.

No Federal Privilege or Immunity is Denied by the State Decision.

The contention of the appellant is that the State statute in question is contrary to Sec. 1 of the 14th Amendment to the United States Constitution because it denies him equal protection of the laws. This position is based upon the fact that under the Wisconsin Income Tax Law the dividends received in 1933 from Wisconsin corporations were eliminated from the computation of net income upon which the State normal income tax was imposed. Such privilege of deducting said dividends from his income and the immunity thereof from taxation under the normal income tax law arises solely by virtue of the express provisions of the Wisconsin income tax law, Ch. 71, Wis. Stats. 1933. Were it not for the provisions of Sec. 71.04 (4) thereof such dividends from Wisconsin corporations received in 1933 would be included in the net income which was subject to tax. Thus the privilege or immunity which the appellant had by reason thereof exists wholly and solely under the State laws. It is, therefore, not a Federal privilege or immunity but purely one arising under a local law.

A Federal privilege or immunity is not denied by the State decision where, if there was a privilege or immunity, it existed wholly under State laws or the State constitution.

New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 49 Sup. Ct. 61, 73 L. Ed. 184.

III.

Appellant's Claim that Rights Under the Federal Constitution have been Violated, is Without Merit for the Reason that He is Dealt with Under the State Statute in the Identical Way all Other Taxpayers Similarly Situated are Treated.

The taxpayer in question as the recipient of dividends in 1933 from Wisconsin corporations is dealt with under Sec. 6 of Ch. 15 of the Laws of Wisconsin, 1935, in the same manner as all other taxpayers in the State who received dividends from Wisconsin corporations in 1933. All taxpayers who received such dividends in 1933 are treated alike and in identical manner under this State law. A tax is imposed upon each of them in the same manner. No one taxpayer is singled out and treated differently from any other taxpayer. Each of such taxpayer's rights were dealt with in an identical manner under the Wisconsin income tax law, Ch. 71, in the imposition of the Wisconsin normal income tax. That is, each of them was entitled to deduct such dividends received in 1933 from the computation of their net income, which was subject to normal income tax in that year. So, under the Wisconsin income tax law the appellant was not dealt with in any manner different from that of any other taxpayer similarly situated. He was granted the same immunity and privilege that all other taxpayers in the same position were granted. All taxpayers similarly situated were under that law treated alike and in identical manner.

Thus it seems clear that there can be no contention of inequality because all have been treated alike. Each taxpayer in the same situation received the same treatment and received the same privileges and immunities. So also the imposition of the tax in question fell upon all alike.

There is thus no denial of equal protection of the laws. Manifestly, this claim of the appellant of denial of equal protection of the laws is erroneous.

A Federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a State court.

Parker v. *McLain*, 237 U. S. 469, 473-474.

The United States Supreme Court is without jurisdiction to review the decision of a State court where there is no substance in the Federal question upon which the jurisdiction depends.

Great Northern R. Co. v. *Alexander*, 246 U. S. 276, 282.

On error from a State court to the United States Supreme Court, where the Federal question asserted to be contended in the record is manifestly lacking all color of merit, the writ of error should be dismissed.

Swafford v. *Templeton*, 185 U. S. 487, 493-494.

Fair color for claiming any rights under the Federal constitution have been violated is necessary to give jurisdiction to the United States Supreme Court on writ of error to a State court based on such federal question.

Wilson v. *No. Car. ex rel. Caldwell*, 169 U. S. 586, 595-596.

IV.

There is No Denial of Due Process as Adequate Legal Proceedings are Provided in the Statute.

There is no denial of due process of law in the tax imposed because Subdivision 5 of Para. (c) of Subsec. (1) of Sec. 6, Ch. 15, Laws of Wisconsin for 1935 expressly

provides for the recovery of the tax in question if paid under protest in the event that the tax is illegally imposed. This is the procedure which the appellant avails himself of in this case and under which the action was started. The tax in itself is no denial of due process of law. The Wisconsin normal income tax is imposed in the same manner and a taxpayer desiring to assert nonliability for such tax must, like the appellant here, pay his tax and bring suit for a refund. The procedure is very similar.

V.

The Decision of the State Court was so Plainly Right as not to Require Argument.

The decision of the State court that the statute in question does not violate the Wisconsin constitution is so plainly right as to not require further argument. Such decision shows that the appellant and all persons similarly situated are treated with equality and fairness under this taxing statute. There is no discrimination and no injustice demonstrated. The legislature has imposed a tax within its power under the State constitution. There is no inequality and no denial of due process. Upon the same reasoning which shows that the statute does not violate the Wisconsin constitution, it does not violate the United States constitutional provisions as claimed by the appellant. The same considerations are involved in both problems.

If it appears that the decision of a Federal question was so plainly right as not to require argument the writ should not be allowed.

Ex parte Spies, 123 U. S. 131, 164.

Respectfully submitted,

ORLAND S. LOOMIS,
Attorney General of the State of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of the State of Wisconsin;
JOSEPH E. MESSERSCHMIDT,
Assistant Attorney General of the State of Wisconsin,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION TO DISMISS APPEAL OR AFFIRM.

Comes now Robert K. Henry and Solomon Levitan, State Treasurer of the State of Wisconsin, appellees herein, by Orland S. Loomis, Attorney General of the State of Wisconsin, Harold H. Persons, Assistant Attorney General of the State of Wisconsin, and Joseph E. Messerschmidt, Assistant Attorney General of the State of Wisconsin, their counsel, and move this Court to dismiss with costs the appeal taken herein to this Court by Earle S. Welch, upon the following grounds:

1. The matter presented is one of purely local concern.

2. No Federal privilege or immunity is denied by the State decision.

3. Appellant's claim that rights under the Federal Constitution have been violated, is without merit for the reason that he is dealt with under the State statutes in the identical way as all other taxpayers similarly situated are treated.

4. There is no denial of due process as adequate legal proceedings are provided in the statute.

5. The decision of the State court was so plainly right as not to require argument.

6. No substantial Federal question is involved.

In the alternative, appellees move this Court to affirm on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated this 2nd day of March, 1938.

ORLAND S. LOOMIS,
Attorney General of the State of Wisconsin;
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Assistant Attorney General of the State of Wisconsin;
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Assistant Attorney General of the State of Wisconsin,
Counsel for Appellees.

Supreme Court of the United States

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No. 13

EARLE S. WELCH,

Appellant.

v.

ROBERT K. HENRY and SOLOMN LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

APPELLEES' BRIEF

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